87-1828

No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ED N. ANDREWS, GEORGE ANDREWS, IDA WELTER ANDREWS, JOHN ANDREWS, WILLIAM R. DESALVO, BOBBY EPPERSON, FRANK FOUGEROUSSE, CHARLES GARRETT, JERRY GARRETT, GARY GILLEY, DON QUINN, JOHN R. HAWKINS, HERMAN F. KAUFMAN, MARGARET E. KAUFMAN, RAY KELLEY, MINUS KINDLE, OTTO L. LIENHART, II, HOOVER MCCOY, TIMOTHY L. MAHAN, LARRY O NEWBERRY, NATHAN L. PALADINO, BOBBY RIDLING, WALLY TEMPLE, RONALD WIDNER and EUGENE C. YOUNG, MORRILTUN LIQUOR, INC. d/b/a #1 LIQUOR, ARKANSAS LIQUOR, INC. and CHARLES GARRETT d/b/a GARRETT'S CAFE,

Petitioners,

v.

T.O. ADAMS, JOHNNY DESALVO and JIMMY D. GARRETT, Election Commissioners of Conway County Arkansas; VERLON WOOD, EDDIE BOWMAN, J. HIGBEE and LARRY MILLER, Members of the Unincorporated Association known as Citizens for Progress,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Question Presented

May a state court, by creating a new procedural springe which was not previously announced or enforced, refuse to consider a valid and substantial federal constitutional issue on the ground that the issue was not properly raised?

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Margaret E. Kaufman, Ray Kelley, Minus Kindle, Otto L. Lienhart, II, Hoover McCoy Timothy L. Mahan, Larry O Newberry, Nathan L. Paladino, Bobby Ridling, Wally Temple, Ronald Widner, Eugene C. Young, Morrilton Liquor, Inc., d/b/a #1 Liquor, Arkansas Liquor, Inc. and Charles Garrett d/b/a Garrett's Cafe, Petition for Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

Opinions Below

The opinion of the Supreme Court of Arkansas is reported at 294 Ark. 160, 741 S.W. 2d 757 (1987). The opinion denying the Petition for Rehearing is reported at 294 Ark. 160, 744 S.W. 2d 386 (1988). The opinion of the Circuit Court of Conway County, Arkansas is not reported.

Jurisdiction

The judgment of the Arkansas Supreme Court (App. A, 1a) was entered on December 21, 1987. A Petition for Rehearing was denied on February 8, 1988. (App. B, 16a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Statutory Provisions Involved

The Complaint which the Petitioners filed in the Circuit Court of Conway County, Arkansas, challenged the constitutionality of the following statutes:

> Ark. Stat. Ann. § 48-816 (Repl. 1977) [Ark Code Ann. § 3-8-305] (the Arkansas statues were recodified in 1987. Citations under the new code are given in brackets)

(a) No election in any town, city, district or precinct of a county shall be held, under this article on the same day on which an election for the entire county is held. When an election is held in an entire county and a majority of the legal votes cast at said election are against the sale, barter or loan of spirituous, vinous, malt or other intoxicating liquors, then it shall not be lawful to sell, barter or loan any such liquors in any portion of the county. If, at such an election for the entire county, the majority of the legal votes cast are in favor of the sale, barter or loan of any such liquors, said election shall not operate to make it legal to grant license to sell, barter or loan such liquors in any territorial division of such county from which the sale, barter or loan has been excluded by an election held under this article, but the status of such territorial division shall remain as if no such election had been held.

(b) No election shall be held in any election precinct under this Act on the same day on which an election is held for the district or city of which the precinct is a part. If at an election held for such entire district or city, the majority of legal votes cast shall be in favor of the sale, barter or loan of spirituous, vinous, malt or other liquors, then the status in the general precinct thereof shall remain as it was before said election; but if the majority should be against the sale, then the sale, barter or loan of such liquors shall be unlawful in every portion of said district or city.

Ark. Stat. Ann. § 48-829.1 (Cum. Supp. 1985); [Ark. Code Ann. § 3-8-103]

The provisions of Section 1 (§ 48-829) of this Act are intended to be amendatory to Initiated Act No. 1 of 1942 [§§ 48-801-48-806] to the extent of permitting

manufacturing facilities used to produce native wines, beer, or for the distilling, blending or rectifying of alcoholic beverages to continue to manufacture said products, and continue to sell to the public on the premises of said facility the products produced at the facility and/or to serve the products produced at the facility to customers in any restaurant or other eating facility located on the premises in the event the area in which the manufacturing facility is located is voted dry in a local option election. Provided, that such retail sales of such products to the public and service thereof in restaurants located on the facilities were engaged in by said manufacturer at the time initiated petitions calling for the local option election were filed.

Ark. Stat. Ann. § 48-1410 [Ark. Code Ann. § 3-9-221]

(a) The General Assembly recognizes that many individuals in this State serve mixed drinks containing alcoholic beverages to their friends and guests in the privacy of their homes and, in addition, many individuals associated together in private non-profit associations and/or corporations established for fraternal, patriotic, recreational, political, social or other mutual purposes as authorized by law, established not for pecuniary gain, have, for their mutual convenience, provided for the preparation and serving-to themselves and their guests of mixed drinks prepared from alcoholic beverages owned by such members individually or in common under a so-called "locker" "pool" or "revolving fund" system. In order to clarify the alcoholic beverage control laws of this state, and to regulate and prohibit the sale of alcoholic beverages in violation of the provisions of this Act [§§ 48-1401-48-4148] and other applicable alcoholic beverage con-

trol laws of this state, the General Assembly hereby determines that the preparation, mixing and serving of such mixed drinks, beer and wine for consumption only on the premises of a private club as defined in Section 2 (j) [Sub-Section j of § 48-1402] hereof by the members thereof and their guests, and the making of a charge for such services, shall not be deemed to be a sale or be in violation of any law of this State prohibiting the manufacture, sale, barter, loan or giving away of intoxicating liquor whenever:

(1) The alcoholic beverages, beer and wine so consumed have been furnished or drawn from private stocks thereof belonging to such members, individually or in common under a so called "locker", "pool", or "revolving fund" system and are replenished only at the expense of such member;

(2) Such private club has acquired a permit from the Board in such form as the Board may appropriately determine. No private club permitted hereunder shall sell alcoholic beverages either by the package or drink. Alcoholic beverages, beer and wine owned by members may be stored on the premises of the club. If any permittee shall sell, barter, loan or give away any intoxicating liquor in violation of this Act or other alcoholic beverage control laws of this State, the permit of such club shall be revoked.

Statement of the Case

In the November, 1986 general election, the voters of Conway County, Arkansas, under Arkansas' local option law, voted against the manufacture or sale of intoxicating beverages within the county. After a recount of the votes, the results were certified on November 10, 1986, as 4,541

for and 4,574 against. The county, previously "wet", was voted "dry" by a margin of 33 votes.

On November 26, 1986, petitioners filed two separate actions contesting the election. (Complaints, App. F, G) The actions were later consolidated for trial and appeal. The complaints each contained two counts. The first count in each complaint alleged that the "drys" had committed election fraud and that the results of the election should be overturned. The second count in each complaint attacked the statutory scheme of regulating the manufacture and sale of intoxicating beverages on federal constitutional grounds. Petitioners alleged that the "local option" statutes violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The complaints noted that the statutory scheme:

(1) allows private clubs to dispense intoxicating beverages in "dry" counties while prohibiting retail sales,

(2) allows the retail sale of intoxicating beverages by wineries and breweries located in "dry" counties,

(3) allows distribution of intoxicating liquors at the wholesale level in "dry" counties, and

(4) allows voters in "wet" counties to vote precincts "dry", but does not allow voters in "dry" counties to vote precincts "wet".

(5) Petitioners also alleged that they were deprived of their property (liquor related businesses) without due process of law.

There are two subclasses of respondents: the election commissioners of Conway County, Arkansas, and "dry" voters who moved to intervene in the election contest. The intervenors filed their petition to intervene on December

12, 1986. Only one of the election commissioners filed an answer, and his answer was filed on May 20, 1987, more than four months after he was served with the complaint. (Opinion of Arkansas Supreme Court, App. A, 2a).

The petitioners moved for default judgment, arguing that the petition to intervene should be denied because it was not joined by ten voters, as required by statute, and that the election commissioners had defaulted by failing to file a timely answer. In a letter opinion and order, entered on May 14, 1987, the trial court denied intervention, granted the motion for default judgment and set aside the election. (Order of trial court, App. E, 36a-37a).

Since the default judgment was entered on procedural grounds, the trial court did not reach the constitutional issues raised in the complaints.

Respondents appealed to the Supreme Court of Arkansas. On appeal, the respondents argued that the trial court was without jurisdiction to consider the election contest because the complaints were not filed within ten (10) days after certification of the vote, as required by Arkansas law. The appellate court agreed and reversed and dismissed the judgment.

Petitioners filed a petition for rehearing arguing that the Court should have reversed and remanded the case for consideration of the constitutional arguments. Petitioners noted that the action in the trial court was actually two separate actions—an election contest and a separate action for declaratory judgment. (Petition for Rehearing, App. C, 30a). The declaratory judgment action was not an election contest and thus did not have to be filed within ten days after certification of the vote. It could have been filed at any time.

In an opinion entered on February 8, 1988, the Arkansas Supreme Court denied the petition for rehearing. The Court did not hold that the action for declaratory judgment was subject to the ten day rule, but held that petitioners had waived their right to consideration of the constitutional issues because the issues were raised for the first time on rehearing. (Opinion denying rehearing, App. B, 19a).

REASONS FOR GRANTING THE WRIT

State courts have a concurrent obligation with federal courts to hear and decide federal constitutional issues. *Lawrence* v. *State Tax Comm.*, 286 U.S. 276 (1932). The Arkansas Supreme Court failed to fulfill that obligation.

Petitioners raised two claims in the trial court. First, they claimed that the election was marred by fraud. Second, they claimed that the statutes under which the election was conducted violate the Fourteenth Amendment of the U.S. Constitution. The trial court did not reach the merits of either claim. The court simply awarded default judgment to the petitioners because respondents did not file a timely answer.

On appeal, respondents argued that the Arkansas Rules of Civil Procedure (patterned after the federal rules) do not apply to an election contest because election contests are governed by a special statutory scheme. Under respondents' argument, respondents could file an answer at any time before trial. Additionally, respondents argued that petitioners had only ten (10) days after certification of the vote to file an election contest. Because the filing deadline is jurisdictional, respondents argued, and petitioners' complaint was not timely filed, the trial court was without jurisdiction to hear the election contest.

Respondents did not argue, however, that the constitutional challenge was governed by the election statutes. That challenge did not contest the correctness of the vote count and thus was not an election contest. The relief requested was a declaration that the statutes were unconstitutional. That declaratory judgment action could have been filed at any time.

Petitioners responded to respondents' argument head on. Petitioners did not file a cross-appeal because they had won in the trial court and did not contend that the trial court erred in any way.

The constitutional questions were not addressed in either the trial court or the Arkansas Supreme Court. The trial court was correct in not addressing the constitutional issues because the Arkansas Supreme Court has held that courts should not reach those issues if the case can be decided on other grounds. *McNew* v. *McNew*, 262 Ark. 567, 559 S.W. 2d 155 (1977); *Osage Oil and Transportation, Inc.* v. *Fayetteville*, 260 Ark. 448, 541 S.W. 2d 922 (1976).

The Arkansas Supreme Court agreed with respondents' argument, holding that the trial court did not have jurisdiction to hear the election contest because it was not timely filed. The court reversed the judgment and dismissed the case.

Petitioners filed a petition for rehearing, arguing that the court should have remanded the case for consideration of the constitutional issues. The court denied the petition on the ground that the issue was raised for the first time on rehearing.

Thus, it is clear that the court's refusal to remand the case was based solely on procedural grounds—the failure to raise the constitutional issues on appeal.

The Arkansas Supreme Court's refusal to consider the constitutional issues conflicts with opinions of this Court.

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

It is well settled that a state court has an obligation to protect and enforce federal rights. *Testa* v. *Katt*, 330 U.S. 386 (1947); *Palmore* v. *U.S.*, 411 U.S. 389 (1973). A refusal to decide the issues is as egregious an error as an erroneous decision of them. "If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question as by an erroneous decision of it, see *Greene* v. *Louisville and Interurban R. Co.*, 244 U.S. 499, 508, 512 et seq; *Smith* v. *Cahoon*, 283 U.S. 553, 564, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked." *Lawrence* v. *State Tax Comm.*, 286 U.S. 276, 282 (1932).

A state court cannot dodge its obligations to enforce federal rights on procedural grounds "unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965). Additionally, a state cannot constitutionally enforce a procedural rule unless it has given notice of the rule. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

In this case, the Arkansas Supreme Court had given no notice of the rule and there is no legitimate state interest in its enforcement.

Petitioners won a complete victory in the trial court; the election was nullified. They did not contend that the trial court erred in any way. When respondents appealed, all petitioners sought was an affirmance of the judgment.

Under Arkansas precedent, an appellee who simply seeks affirmance of the trial court's judgment has no obligation to cross-appeal. *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W. 2d 669 (1979). Indeed, the Arkansas Supreme Court reiterated this rule in an opinion rendered the same day as the opinion in this case. "A cross-appeal is required only when the appellee seeks affirmative relief that he failed to obtain in the trial court, not when he won the case below and merely asks that the judgment be affirmed." *Brooks* v. *Town & Country Mutual Insurance Company,* 294 Ark. 173, 174, fn 1 (1987).

Since petitioners obtained complete relief in the trial court, the *only* issue they could have raised in a cross-appeal was that the trial court erred in failing to consider their constitutional claims. That claim would have been thwarted by another procedural rule. Arkansas courts hold that constitutional issues should not be reached if the case can be disposed of on other grounds. *Osage Oil and Transportation, Inc.* v. *Fayetteville,* 260 Ark. 448, 541 S.W. 2d 922 (1976). Thus, petitioners were in a classic catch-22; they could not raise the trial court's failure to consider the constitutional issues, and the Supreme Court refused to remand the case for consideration of those issues because petitioners failed to raise them.

The Supreme Court refused to remand the case for consideration of the constitutional issues because that issue was not raised before the petition for rehearing. As demonstrated herein, the court had never before announced or enforced such a rule in a similar situation. The Court has enforced such a rule when the losing party on appeal raises an issue for the first time on rehearing which goes to the merits of the case, *i.e.*, an attempt to change the Court's opinion. That was the situation in *Bost* v. *Masters,* 235 Ark. 393, 361 S.W. 2d 272 (1962), which the Court relied upon to support its refusal to remand the case.

The Court has taken an entirely different position in cases where the trial court failed to rule on an issue raised in the trial court by the losing party on appeal. For example, in *First State Bank* v. *Twin City Bank,* 290 Ark. 399, 720 S.W. 2d 295 (1986), the Court reversed but remanded the case for consideration of an issue not reached by the trial court. *Accord Simmons First National Bank* v. *Wells,* 279 Ark. 204, 650 S.W. 2d 236 (1983). Thus, petitioners had every right to expect the Court to remand the case for consideration of the constitutional issues. Petitioners had no notice of the rule applied by the Court to support its refusal to remand.

It is also clear that the state had no legitimate interest in enforcement of the rule. The purpose of the rule, as normally applied, is judicial economy. It forces an appellant to raise all issues in the initial brief and prevents a second bite at the apple. However, petitioners were not the appellants below, they were appellees. The Arkansas Supreme Court has expressly held that appellees do not have to raise any issue on appeal if the only relief sought is affirmance. Additionally, applying the rule to appellees conflicts with another rule of judicial economy—constitutional issues should not be reached if the case can be decided on other grounds. Applying both rules to appellees resulted in no hearing for appellees' constitutional claims. Surely the state has no legitimate interest in applying conflicting rules of judicial economy which results in deprivation of a right to a hearing on constitutional claims.

In short, the Arkansas Supreme Court used a procedural device, never before applied in a similar situation, to avoid its obligation to consider valid and substantial federal constitutional issues. This Court has held that it cannot do so. If petitioner's constitutional rights are vindicated, they will be vindicated only under order of this Court.

CONCLUSION

As demonstrated above, it is elementary that a litigant is entitled to a hearing on well-pleaded constitutional claims. That entitlement cannot be defeated on procedural grounds unless the procedural rule serves a legitimate interest. In this case, the petitioners had no notice of the rule and it serves no legitimate state interest. Thus, this case is appropriate for summary reversal.

Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners

Certificate of Service

I, ALEX STREETT, hereby certify that, in compliance with Rule 28 of the Rules of the Supreme Court of the United States, three copies of this Petition of Writ of Certiorari have been deposited within a United States Post Office, with first class postage pre-paid, addressed to M. Watson Villiness, II, Esquire, 813 Parkway, Conway, Arkansas 72032 on this day of May, 1988.

BY: .....

APPENDICES

APPENDIX A

Opinion of the Supreme Court of Arkansas, rendered December 21, 1987

SUPREME COURT OF ARKANSAS

No. 87-103

Opinion Delivered December 21, 1987

JIMMY D. GARRETT, Election Commissioner of Conway County, Arkansas, et al.,

Appellants,

v.

ED N. ANDREWS, GEORGE ANDREWS, et al.,

Appellees.

Appeal from the Conway County Circuit Court;

Civ. # 86-274;

The Honorable Russell Rogers, Judge;

Reversed and Dismissed.

ROBERT H. DUDLEY, Associate Justice

On November 4, 1986, the voters of Conway County were presented with the local option of whether to continue allowing the manufacture and sale of alcoholic beverages. After a recount of the votes, the election results were certified on November 10, with the "drys" winning by 33 votes. On November 26, which was 16 days after

the certification, the "wets" filed a complaint contesting the election result. The complaint named as defendants the three election commissioners. Four "drys" petitioned to intervene in the contest and pleaded that the contest was not timely filed, since it was not filed within 10 days of the certification as required by Ark. Stat. Ann. § 48-820 (2). On May 20, 1987, one of the election commissioners, Jimmy Garrett, filed a general denial. Process had been served on Garrett December 2, 1986. The trial court found the contest had been timely filed, and that the petitioners, the "wets," were entitled to a default judgment setting aside the election. We reverse and dismiss.

The first point of appeal raised by the appellants, or the "drys," is that the trial court erred in refusing to dismiss the complaint due to its untimely filing. The argument has merit. Ark. Stat. Ann. § 48-820 (Repl. 1977), which is a part of the Arkansas Alcoholic Control Act provides in pertinent part:

> 48-820. *Contest of election.—Any election held under this law may be contested as provided for in this section:*
>
> 1. *Hearing and determination.* The contest shall be heard and determined by the same board which, by law, is authorized and empowered to hear and determine a contest of an election for county officers; and the same provisions of the statutes shall apply to the contest of any election held under this law as are provided for the contest of any election for county officers, except as hereinafter provided.
>
> 2. *Petition.* Any number of the citizens and legal voters, but not less than ten [10] of the county, city,

> town, district, or precinct in which the elections have been held, shall have the right to contest any election held under this law, and shall be designated the contestants. Such contestants shall, *within ten (10) days after the final action of the examining board,* file in the office of the clerk of the county clerk a written statement of the grounds of the contest, and shall cause a copy thereof, to be served on the county judge, and shall give notice thereof by written or printed notice to be posted at the courthouse door of the county, and in three or more public places in the county, city, town, district or precinct in which the election has been held, and shall cause the same to be published in some newspaper of the county, when possible, for two [2] consecutive issues, commencing not later than the first issue of the paper after filing the statement. When a notice of the contest shall be executed on the county judge, the certificate shall not be recorded.

(Emphasis added.)

The first independent clause of subsection 1 above provides that a local option contest is to be heard by the same "board" that is authorized by law to hear a contest of an election for county officers. "Board" now means circuit court. *Henderson* v. *Anderson,* 251 Ark. 724, 475 S.W. 2d 508 (1972). The second independent clause of the subsection, the key clause, provides that statutes governing the contest of any election for county officers shall apply to local option election contests, *"except as hereinafter provided."* Subsection 2 then contains the exceptions which apply to local option contests. One of the exceptions provided is the requirement that the contest be filed "within

10 days after the final action of the examining board." This means within ten (10) days after the certification of the vote. *Wurst* v. *Lowery*, 286 Ark. 474, 695 S.W.2d 378 (1985). In *Wurst*, we said:

> We hold that, by analogy, Wurst's time for intervening in the case expired with the lapse of the time allowed for filing a contest of a local option election, which is ten days after the certification of the vote. Ark. Stat. Ann. § 48-820 (Repl. 1977).

The appellees argued, and the trial court ruled, that a different statute, Ark. Stat. Ann. § 3-1001 (Repl. 1976), was the governing statute. It allows twenty (20) days for the filing of an election contest. That statute is a part of the comprehensive election code of 1969, which contains thirteen (13) articles, all of which are directed toward elections involving *candidates*, and not toward local option elections.

Ark. Stat. Ann. § 3-1001 provides:

> 3-1001. *Procedure.*—A right of action is hereby conferred on any *candidate* to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election. The action shall be brought in the Circuit Court of the county in which the certifications of nomination or certificate of vote is made when a county or city or township office, including the office of county delegate or county committeeman, is involved, and except as hereinafter provided, within any county in the Circuit or District wherein any of the wrongful acts occurred when any Circuit or District office is involved, and, except as hereinafter provided, in the Pulaski Circuit Court

> when the office of United States Senator or any State office is involved. If there are two (2) or more counties in the District where the action is brought and when fraud is alleged in the complaint, answer or cross complaint the Circuit Court may hear testimony in any county in the district. The complaint shall be verified by the affidavit of the contestant to the effect that he believes the statements thereof to be true, and shall be filed within twenty (20) days of the certification complained of. The complaint shall be answered within twenty (20) days.

(Emphasis added.)

The repealer section of the comprehensive act does not specifically repeal the local option act. Appellees argue that Ark. Stat. Ann. § 3-1004(c) repealed the local option election act. Section 3-1004(c) provides:

> (c) Except as hereinafter provided all laws pertaining to *general and special elections* or rules of political organizations holding primary elections providing for contest before political conventions or committees other than the proceedings herein provided shall be of no further force or effect.

(Emphasis added.)

However, "general and special elections" are defined as elections involving only *candidates* or *officials*. Ark. Stat. Ann. § 3-101(c) provides:

> (c) "General or special election" shall mean the regular biennial or annual elections for election of United States, State, District, County, Township and Municipal *officials*, and the special elections to fill vacancies

> therein. Such term, as used in this Act, shall not apply to school elections for *officials* of school districts.

(Emphasis added.)

Thus, the local option election statute, which does not involve candidates or officials, was not repealed by the comprehensive election code. Our interpretation of these statutes is consistent with the rule of statutory construction which provides that two statutes should be construed so as to give effect to both, if possible, and repeals by implication are not favored by the law. *Faver* v. *Golden, Judge*, 216 Ark. 792, 227 S.W.2d 453 (1950).

The appellees argue that the interpretation we adopt is inconsistent with our holding in *Henderson* v. *Anderson*, 251 Ark. 724, 475 S.W.2d 508 (1972). Our holding in that case is that jurisdiction to try local option election contests is in circuit court. All else is dicta.

The appellees did not file this election contest within the ten (10) day period specified by § 48-820, the governing statute. As a result, the trial court should have dismissed the complaint. In *Gower* v. *Johnson*, 173 Ark. 120, 292 S.W. 382 (1927), we explained:

> The judgment of the circuit court was correct. Under our previous decisions construing our primary election statute, the right to contest a primary election is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial. The provision requiring the contest to be filed within ten days has been held to be mandatory and jurisdictional. If the contest is not filed within ten days after certification of the nomination complained of, the failure to institute the contest within that time

> is fatal to the right of the contestant. *Hill* v. *Williams*, 165 Ark. 421, 264 S.W. 964, and *Storey* v. *Looney*, 165 Ark. 455, 265 S.W. 51.
>
> As was said by the Supreme Court of the United States in *Walsh* v. *Mayer*, 111 U.S. 31: "The provisions requiring it to be asserted in a particular mode and within a fixed time are conditions and qualifications attached to the right itself, and do not form part of the law of the remedy. If it is not asserted within the limited period, it ceases to exist, and cannot be claimed or enforced in any form."

Accordingly, we must reverse and dismiss this cause.

The only remaining issue is the appellees', or "wets'," argument that the appellants, or "drys," had no standing to resist the election contest. Four appellants attempted to intervene in the suit against the election commissioners. The trial judge ruled that these four voters could not intervene, because the applicable statute, § 48-820(3), requires ten (10) voters to resist a local option contest. We need not determine whether that ruling was correct, because, in addition, one of the election commissioners, a named defendant, entered his appearance to resist the contest. If his appearance had been made within twenty (20) days after he was personally served, there would be no question about his standing. However, his appearance was made more than (20) days after service. As a result, the appellees contend the appellants have no standing and they are entitled to a default judgment under ARCP Rule 55. The contention is without merit.

The local option election statutes do not set a specific number of days for the filing of an answer. Under such

circumstances, in a local option election contest, a trial court may permit an answer at any time between the prompt filing and the expedited trial. *See Cain* v. *McGregor,* 182 Ark. 633, 32 S.W.2d 319 (1930). Since the trial court could permit the answer to be filed at any time before the trial commenced, the response filed in this case was sufficient to prevent a default, and the appellant election commissioner does have standing.

Further, even if the contestee were in default, a default judgment setting aside the election would not be mandated. The Rules of Civil Procedure apply to civil actions. ARCP Rule 2. A civil action is an ordinary proceeding by one party against another for the enforcement or protection of a *private* right or redress or prevention of a *private* wrong. Ark. Stat. Ann. § 27-106 (Repl. 1979). Every other remedy is a special proceeding. Ark. Stat. Ann. § 27-107 (Repl. 1979). Therefore a local option election contest is a special proceeding, and it is not necessary that all of the rules of civil procedure be applied. *See Reed* v. *Baker,* 254 Ark. 631, 495 S.W.2d 849 (1973). As we said in *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S.W. 2d 235 (1934), judicial application of procedural rules in election contests "must not be so strict as to afford protection to fraud, by which the will of the people is set at naught, nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause."

Therefore, Rule 55 should not be applied to a special proceeding when the result would be to set aside a valid public election without any proof whatsoever. In fact, the local option election statute contemplates proof even where there are no contestees. Ark. Stat. Ann. § 48-820(4) pro-

vides in pertinent part: "In case the required number [10] shall fail to appear as contestees, ex parte testimony shall be competent. . . ."

Reversed and dismissed.

Hickman, J., concurs.

Hays and Glaze, JJ., dissent.

DISSENTING OPINION

TOM GLAZE, Associate Justice

I am astounded by the court's decision. Generally speaking, I feel this court has shown enlightenment when called upon to interpret reform legislation in a way to meet its purposes and goals. However, of the several theories the parties advanced in this case, the court has managed to accept the one argument that not only defeats the minimal election reforms gained by the passage of Act 465 of 1969, the Arkansas Election Code, its interpretation of that Code reverts to the way our election laws existed in 1874. At the same time the court's decision effectively buries the serious allegations of widespread election fraud that arose out of the Conway County General Election on November 4, 1986.

The court's opinion is flawed in so many respects that I find it difficult to know where to begin; but I will try.

First, I will begin with a brief recitation of what led to this appeal. Local option elections, commonly called "wet/dry elections," are by law required to be held at the same time the general election is conducted. *See* Ark. Stat. Ann. § 48-801 (Supp. 1985) and § 48-824 (Repl. 1977). Here, a wet/dry election was held in Conway County on November 4, 1986. The Conway County Board of Election

Commissioners (hereinafter Commissioners) certified the "drys" as having won by thirty-three votes. Sixteen days later, the "wets" filed an election contest, alleging election fraud. Although the irregularities are too numerous to list here, some of the allegations were:

*Election officials or their agents fraudulently substituted ballots that they previously marked for all the voters in two voting precincts;

*Voters shown as having voted twice;

*Nonresident and nonregistered voters had voted or were voted by someone other than the voter;

*Ballots were marked by pencil, except the wet/dry question, which had been marked by pen (and vice versa);

*Ballot boxes contained more ballots than voters named on the voter lists;

*Erasures made in the "wet box" on ballots, which were counted as "dry" votes;

*A dead person was voted;

*Electioneering was practiced within the polling places.

The Commissioners were served with the "wets'" complaint, but, for whatever reason, the Commissioners chose not to respond. About one month after the votes had been certified, four individuals, who were "drys" filed a motion to intervene and asked the court to dismiss the wets' complaint because they claimed Ark. Stat. Ann. § 48-820(2) (Repl. 1977) required the wets' complaint to have been filed within ten days of the Commissioner's certification of the vote, and the wets had filed their complaint six days too late. The trial court ruled the ten-day requirement had been superceded by the twenty-day requirement contained in Ark. Stat. Ann. § 3-1001 (Repl. 1976) of the Arkansas Election Code and the wets' complaint was timely

since it had been filed sixteen days after the vote was certified. The trial court also held the drys had not properly or timely intervened and the wets were entitled to a default judgment.

The majority court opines that the ten-day requirement in the 1935 local option statute, § 48-820(2), controls because the twenty-day limitation in the 1969 code, § 3-1001, applies only to elections involving *candidates*. The majority's conclusion here is "bad wrong." If it were right that the Code applies only to the election of candidates and officials, the Arkansas General Assembly needs to convene immediately to enact some election laws to conduct elections which bear on millages, bonds, annexations, initiatives and referendum measures, just to name a few. Like local option elections, most of these questions are required to be placed on the ballot at the biennial general election. If the Code provisions (including its chapters on State and County Board of Election Commissioners, General and Special Elections, Conduct of Elections, Absentee Voting, Voting Machines, as well as Election Contests) apply only to candidates and not issues, then we have no election laws by which the state can conduct an election pertaining to the important ballot questions I listed above. Of course, such a conclusion is unthinkable.

Instead, the conclusion that the Code applies to issue elections as well as ones involving candidates is unquestionably the case, at least until the majority's decision today. The enactment of § 48-802 (Repl. 1977) (emphasis added), in fact, made it very clear that the local option elections *"shall be conducted by the Election Commissioners in the same manner as General Elections are conducted, and the same responsibility should rest upon all election officials conducting said election as in conducting*

General Elections, and only qualified electors shall be eligible to vote therein." [1]

The Code, which covers all primary, special, and general elections, contains an entire chapter as to how election contests must be conducted. It also spells out the election officials' duties in such contests and, after defining those duties and procedures, § 3-1004(c) of that Code chapter, concerning election contests, provides:

> . . . *all laws pertaining to general and special elections or rules* of political organizations holding primary elections providing for contest before political conventions or committees *other than the proceedings herein provided shall be of no further force or effect.* (Emphasis added)

Clearly, the General Assembly intended by § 31004(c) to apply the election contest provisions of the Code to all general, special, and primary elections. On the other hand, § 48-802, a 1942 Initiated Measure noted above, shows conversely that the people intended the local option elections to be conducted pursuant to the election laws (the Code) that apply to the biennial general election. The entire idea or intent behind these laws or measures was to have a uniform election system which covered all elections, albeit for candidates or issues. For example, as alluded to earlier, most issue-type elections, including local option elections, have absolutely no laws that govern how they should be conducted except for the provisions contained in the Code. Furthermore, the election contest provisions which *were* established in the old 1935 local option law now clearly

[1] Section 48-802 was amended by § 2 of Act 266 of 1985 to provide for a four-year period (instead of a two-year period) lapse in time before another election can be held on the same question in the same affected territory.

conflict with the contest provisions set out in the Code. Thus, to accept the majority's logic that those 1935 election contest provisions are still viable means that two entirely different and conflicting election contest laws would apply to the same general election, when a local option was also held. *See* Ark. Stat. Ann. §§ 48-820 to -822 (Repl. 1979) and §§ 3-1001 to -1009 (Repl. 1976).

Relying on certain language in § 48-820, the majority says that the election contest procedure in local option elections is independent from that which is provided in the Code. Wrong again! That statute was based upon the law as it was in 1935. At that time, election contests were within the jurisdiction of the *county court*. *See* Ark. Stat. Ann. § 3-1205 (Repl. 1956). Thus, the procedures in § 48-820, which direct election contests to be filed with the clerk of the county court, are simply no longer the law. The majority attempts to explain the outdated reference (in § 48-820) to "Board" as meaning "circuit court", but such an explanation is undermined by reading the following statutory provision, § 48-821, which provides that contestants or contestees have a right to appeal "from the decision of the board to the circuit court." Obviously, if a "board's" decision was appealed to the circuit court in 1935, we cannot then equate the term board with the circuit court today. There simply is no reconciling these old terms and references contained in the 1935 local option contest procedures because they reflected, and meshed with, the general election laws as those laws existed in 1935.

The local option laws have since changed in 1942, 1943, 1983, and 1985, as have the comprehensive election laws in 1969 and afterwards. When the Code provided for a twenty-day requirement in election contests, any statute in

force contrary to that requirement was superceded. *See* § 3-1004(c). While the majority notes that § 48-820 was not specifically repealed by the Code, the Code did provide that all election contest laws, other than that contained in § 3-1004(c), were of no further force and effect. As a consequence, the local option ten-day requirement for filing election contests must fall to the twenty-day provision set forth in the Code.

I make brief reference to the majority's mention of *Wurst* v. *Lowery*, 286 Ark. 474, 695 S.W. 2d 378 (1985), as authority that the ten-day requirement in § 48-820 is still law. Suffice it to say, the parties never contended in *Wurst* that such ten-day limitation was superceded by §§ 3-1001 and -1004(c), or, if they had, I am sure that Justice George Rose Smith, the author of *Wurst*, would have agreed Wurst would have had twenty, not ten days, to intervene in the local option contest involved there. However, if one is unconvinced by that position and believes the ten-day requirement was upheld as law in *Wurst*, I certainly have no hesitation in holding the court was wrong.

Finally, while I conclude the twenty-day limitation is controlling and the wets timely filed their complaint, I am still of the opinion that they must show a prima facie case in accordance with the language contained in § 3-1002 of the Code. In other words, the trial court must require the wets to prove that their cause of action is such that the election results should be changed. In this respect, there is little difference between a default action in an election contest from one arising in any civil action.

I regret the court's decision today because I believe it does damage to our election laws. In particular, Arkansas citizens and voters bear an onerous burden, even under the Code, to investigate and confirm the election irregu-

larities that are necessary to file a proper contest within the required twenty-day period—a ten-day period, on the other hand, is an impossible limitation to meet. Here, serious allegations of election fraud have been made and those allegations should either be proved or dispelled. Public interest demands it, or our citizens' faith and confidence in their government will be diminished. Most of the people who were organized on both sides of this issue in Conway County are unquestionably honest and want only an accurate certified vote, devoid of fraud. Our decision does nothing to resolve the most serious questions that underlie this case, and, instead, allows the allegations of fraud to remain unchallenged. At the very least, I believe the prosecutor of the district or the state attorney general should investigate these fraud allegations and resolve them one way or another.

HAYS, J., joins in this dissent.

CONCURRENCE

DARRELL HICKMAN, *Associate Justice*

I concur in the result and note that it may be the Arkansas Election Code was intended to cover local option elections; specifically, to change the ten day time in which to challenge an election to 30 days. However, the question is academic. We decided in *Wurst* v. *Lowery*, 286 Ark. 474, 695 S.W. 2d 378 (1985), the ten day provision was still alive. That decision was notice to all, like all precedents are. For parties and lawyers to have ignored *Wurst* and presumed it wrong was not wise; to overrule *Wurst* now would penalize those who have a right to rely on it.

I go with precedent.

APPENDIX B

Opinion of the Supreme Court of Arkansas on Petition for Rehearing, rendered February 8, 1988

SUPREME COURT OF ARKANSAS

No. 87-103

Opinion Delivered February 8, 1988

JIMMY D. GARRETT, Election Commissioner of Conway County, Arkansas, et al.,

Appellants,

v.

ED N. ANDREWS, GEORGE ANDREWS, et al.,

Appellees.

Appeal from the Conway County Circuit Court;

Civ. # 86-274;

The Honorable Russell Rogers, Judge;

Petition for Rehearing Denied.

ROBERT H. DUDLEY, Associate Justice

The petitioners ask for rehearing. Since there is neither an error of fact nor of law in the original opinion, we deny the petition.

The dissenting opinions contend that the majority opinion misconstrues the case of *Henderson* v. *Anderson*, 251

Ark. 724, 475 S.W. 2d 508 (1972). The original majority opinion states:

> The appellees argue that the interpretation we adopt is inconsistent with our holding in *Henderson* v. *Anderson,* 251 Ark. 724, 475 S.W. 2d 508 (1972). Our holding in that case is that jurisdiction to try local option election contests is in circuit court. All else is dicta.

The statement is correct. The first paragraph of the opinion in *Henderson* sets out the question that was before the Court: "The question we must resolve is whether the county court had jurisdiction."

The *Henderson* opinion summarizes its holding very concisely:

> It is therefore our conclusion that Act 108 of 1935 provides that the contest of any local option election should follow the statutes providing for the contest of any election for county officers; and that Act 465 of 1969 provides that the contest for a county office shall be brought in the circuit court.

According to Black's Law Dictionary, "dicta" are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, and they lack the force of an adjudication. Thus, the original opinion in this case correctly interprets *Henderson.*

The sentence from *Henderson,* quoted above, which summarizes the holding states that Act 108 of 1935, *the local option act,* provides for resolution of the jurisdictional question by referring to the statutes governing the contest for election of county officers, which is Act 465 of 1969, or the election code of 1969. Thus, the court in *Henderson*

only applied the 1969 act by incorporation through the local option act.

The paragraph of the local option statute which governed *Henderson* and also governs the case at bar is as follows:

> 1. *Hearing and determination.* The contest shall be heard and determined by the same board which, by law, is authorized and empowered to hear and determine a contest of an election for county officers; and the same provisions of the statutes shall apply to the contest of any election held under this law as are provided for the contest of any election for county officers, *except as hereinafter provided.*

The first clause of the statute quoted immediately above provides that the contest of a local option election shall be heard by the same court as is authorized to hear the contest of an election for county officers. The last clause of the statute provides that the same provisions of the statutes shall apply to local option election contests as are provided for the contest of any election for county officers. However, the last clause also provides, "*except as hereinafter provided.*" None of the exceptions which follow in the next section of the statute were material in *Henderson;* but one of them, the requirement that a contest be filed within 10 days, is the crucial point of the case at bar. The exception, quoted in full in the original opinion, governs the case at bar, and mandates holding that a local option election contest must be filed within 10 days.

The petitioners alternatively ask us to modify the mandate in this case from reversed and dismissed to reversed and remanded in order that they might present arguments that the local option election act is unconstitutional. We decline to do so.

The appellants' (respondents in this motion) first point of appeal was: "The trial court erred in not dismissing the complaint of the appellees due to the late filing thereof pursuant to Ark. Stat. Ann. § 48-820. The trial court lacks jurisdiction." Their entire argument on the point was devoted to the proposition that the case should have been dismissed. In response to the point the appellee, petitioner here, argued that Ark. Stat. Ann. § 48-820, the local option act, was not applicable and therefore the trial court correctly refused to dismiss the case. In their brief the appellees never once argued that there remained a constitutional issue to be decided by the trial court. The argument is raised for the first time on rehearing. We do not consider a contention advanced for the first time on rehearing. In *Bost* v. *Masters*, 235 Ark. 393, 361 S.W. 2d 272 (1962) (citations omitted), in a similar denial of rehearing, we wrote:

> In other words, appellee never made the contention, now advanced, in her original brief. We have said on numerous occasions that we do not consider matters, in civil actions, which are not argued in the brief, and and any point not argued is deemed waived.

Denied.

Hickman, Hays, & Glaze, JJ., dissent.

Purtle, J., concurs.

DISSENTING OPINION

Tom Glaze, Associate Justice

The majority members' decision in this case will assuredly become known as one of this high court's all-time

worst. How is a decision relegated to such an abysmal distinction? Because only a few decisions are so bad that they obtain such infamous distinction, I feel compelled to provide the reader with the criteria that qualify opinions for this lowly status. In order to qualify, an opinion must meet all of the following three tests.

I. The Decision Must Fail to Follow Precedent Without Saying so, Erradicate the Existing Law (as it is Generally Known) and Replace That Law With a Worse Rule of Law in its Stead.

Since my earlier dissent details how the majority opinion totally "missed" the law that controls this case, I merely summarize those points which serve to meet the first test set out above. In one fell swoop, the majority members' opinion (1) ignored precedential authority without an acknowledgment of having done so, (2) caused irreparable damage to Arkansas's Election Code which was intended to furnish the mechanics to hold and conduct elections in this state, (3) readopted a 1935 election procedure which makes it virtually impossible for voters to contest voter fraud allegations in local option elections, (4) buried allegations of wholesale fraud in a recent county-wide local option election, and (5) placed in issue the constitutionality of any called election held for the purpose of allowing citizens to vote on questions involving issues such as bonds, millages, initiatives or referendums, just to name a few.

II. The Decision Must Want in Fundamental Legal Scholarship, Which Actually Causes an Erroneous Result to Be Reached by the Court.

This criterion is undoubtedly the most embarrassing, especially for appellate judges whose stock and trade is

to write clear and concise opinions to resolve peoples' legal disputes. Even so, the majority's opinion surely qualifies.

The essence of this case is whether the 1969 Election Code applies to local option election contests. In 1972, this court held the Code does cover such contests. *Henderson* v. *Anderson*, 251 Ark. 724, 475 S.W.2d 508 (1972). The issue in *Henderson* was simple: Must local option election contests be filed in the county court under the 1935 local option law or in the circuit court, as provided by the 1969 Code? I quote the court's answer:

> It is therefore our conclusion that Act 108 of 1935 provides that the contest of any local option election should follow the statutes providing for the contest of any election for county offices; and that Act 465 of 1969 [Election Code] provides that the contest for a county office shall be brought before the circuit court. (Bracketed insertion mine.)

Id. at 726, 475 S.W.2d at 509.

The majority members, in their opinion, simply ignore the *Henderson* court's holding that applied the 1969 Election Code to local option elections. They did so saying, of all things, that everything in the *Henderson* opinion was dicta, except that part which stated that local option contests must be filed in circuit court. I can only say that such an explanation reveals a want of basic scholarship of the law—as I know it, at least. Obviously, the *Henderson* court's holding required its threshold decision that local option election contests are controlled by the 1969 Election Code. Frankly, if I were asked to give the family law students I instruct an example of an opinion which employed dicta, I certainly would not embarrass myself

by citing the *Henderson* case, as the majority members have done in this case.

In their opinion denying rehearing, the majority members make one last ditch effort to rationalize their failure to follow *Henderson* and, in doing so, add still another glaring error to those I have already set out in my earlier dissent. Today, the majority says, "... [T]he court in *Henderson* 'only' applied the 1969 Act by incorporation through the local option act." This statement simply is not true. In fact, the court applied the 1969 Election Code because of a repealer provision set forth in Ark. Stat. Ann. § 3-1004(c) (Repl. 1976), which I discuss in point III below. The *Henderson* court made specific note of § 3-1004 having been cited and argued to support the contention that the county court had no jurisdiction of the election contest. The court then stated unequivocally that it agreed with that contention. *Id.* at 725-726, 475 S.W.2d at 509.

III. The Decision Must Require Action by the Arkansas General Assembly to Enact Remedial Legislation to Correct the Error of Law Contained in the Court's Opinion.

This court, at times, is requested to unravel problems that have resulted from poorly drafted legislation. That is not the situation at hand. In fact, the *Henderson* decision made it clear that the 1969 Election Act's title reflected that it covered local option elections and that one of the Act's provisions, Ark. Stat. Ann. § 3-1004 (Repl. 1976), specifically provided that other election contest laws —than those contained in the Act—were of no further force or effect.

In conclusion, because of the decision reached by this court's majority, controversy and confusion will ensue. In the majority members' view, the 1969 Election Code does not apply except to elections involving candidates, not issues. The state, counties and municipalities are left with no laws or election apparatus by which they can conduct issue-oriented elections. The Governor and the Arkansas General Assembly must now correct this absurdity, which is a direct result of the majority's decision in this case.

Because of the appellant's petition for rehearing, the majority members have been given a chance to avoid the infamy their opinion so clearly invites. The petition should be granted, and the court should remand this case for the appellees to show a prima facie case that the election results should be changed.[1]

HAYS, J., joins in this dissent.

DISSENT ON DENIAL OF REHEARING

DARRELL HICKMAN, Associate Justice —

Traditionally, we only grant a rehearing if we have made a mistake of law or fact, but it is not against the law for a judge or a court to change its mind, especially

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[1] Justice Purtle has added his concurrence and refers to *Wurst* v. *Lowery*, 286 Ark. 274, 695 S.W.2d 378 (1985) as being controlling here. As I pointed out in my earlier dissent, the *Wurst* case did not deal with the issue now before us, of whether the 1969 twenty-day contest provision superseded the prior 1935 ten-day provision. *See Garrett* v. *Andrews*, 294 Ark. 160, 168, —— S.W. 2d —— (1987) (Glaze, J., dissenting). The only value the *Wurst* decision has in this case is to serve as a red herring; that decision surely offers no precedent or justifiable comfort for any member of this court to reach the holding the majority reached in this cause.

when it is perceived a mistake in judgment has been made. We did both in this case—we made a mistake of law and one in judgment. Unfortunately, the court refuses to acknowledge that.

Our whole debate in this case centered on whether the election code of 1969 applied to local option elections. The issue was critical because the petition to contest the election in this case was not filed within 10 days of the election. Under the old local option law, Act 108 of 1935, the contest petition was filed too late; but, if the election code of 1969 governed, it was timely. This whole lawsuit and the resolution of it focused on this one issue. Did the 1969 law apply to local option elections?

A majority of the court members decided the 1969 election code did not govern local option elections. Justice Dudley wrote the majority opinion and based the court's decision on several premises. First, the 1969 election code did not specifically repeal the local option provision and repeal by implication is not favored. Another basis was our decision in *Wurst* v. *Lowery,* 286 Ark. 474, 695 S.W.2d 378 (1985), where we made reference to the ten day provision in the local option act as though it were alive and not repealed.

Justice Glaze wrote a powerful dissent, but he was unable to convince a majority of us that he was right. While I did not join the majority opinion, I agreed with the decision reached, relying on the decision in *Wurst.* Upon reflection, I see that Justice Glaze was right. But perhaps more important, since our decision, Justice Glaze has pointed out a glaring oversight on our part. The answer to our question was literally right under our noses and we all missed it. In fact, a controlling case, *Henderson* v. *Anderson,* 251 Ark. 724, 475 S.W.2d 508 (1972), was cited

in the majority opinion but dismissed as not controlling because the pertinent language was mere dicta. That is incorrect. In *Henderson*, a unanimous decision, we *held* the election code of 1969 did apply to local option elections. That's the issue in this case. How could we make such a mistake? That's the kind of blunder judges have bad dreams about—citing a case for one proposition while it holds exactly the opposite. The majority opinion is simply wrong in its treatment of *Henderson* and there is no room to quibble about it. *Wurst*, decided 13 years after *Henderson*, did not mention *Henderson*, probably for the simple reason that the *Wurst* language was indeed dicta and not a holding. It was an inexcusable mistake on our part. How or why we made it is immaterial at this point. What we do about it is all that matters.

I assumed that we, the court, would readily acknowledge the error and correct it. But that is not to be. The decision and opinion will stand. Consequently, I have to write this dissent.

The issue in *Henderson* was whether a provision, which is a part of the local option act, was governed and indeed changed by the new election law. The local option law said contests would be filed in county court. The 1969 election code said contests would be filed in circuit court. We *held* in *Henderson* that the new election law applied, even though no mention was made in the 1969 law that it was intended to govern local option elections. We said in *Henderson* that had the legislature intended to exclude local option elections, it would expressly have done so.

In the majority opinion in this case, we hold exactly the opposite: if the legislature had intended the new act to govern local option elections, it would have specifically repealed those provisions. How could two decisions be

more clearly in conflict? *Henderson* holds without question exactly contrary to what our decision is in this case, and we refuse to acknowledge it. While this is an embarrassment, we ought to unhesitatingly correct our mistake, acknowledge *Henderson*, overrule *Wurst*, and send this case back for a trial.

It matters not what I think *Henderson* stands for or what the majority thinks it says. It speaks for itself. If there was the slightest change I thought my judgment was wrong, I would be silent, because this kind of mistake and, more especially the refusal by the court to correct it, reflects upon the integrity of the court.

Hays, J., joins in the dissent.

DISSENTING OPINION TO THE DENIAL OF REHEARING

STEELE HAYS, Associate Justice

While I agree with the dissenting opinions I feel the need to add my own views to the several being expressed. I read the opinion of Justice Lyle Brown in *Henderson* v. *Anderson*, 251 Ark. 724, 475 S.W.2d 508 (1972) as precedent for this case. In *Henderson* this court held that the circuit court had jurisdiction to try wet-dry elections. Why? Because under the provisions of Act 456 of 1969 a contest of local option elections was removed from county court and placed in circuit court. There were no dissents to that holding and it binds us now, or should.

Wurst v. *Lowry*, 286 Ark. 474, 695 S.W.2d 378 (1985) is not precedent for this case. In *Wurst* we held that an attempt in April 1984 to intervene in a local option elec-

tion contest held in *November, 1980* was "far too late." We simply drew an *analogy* to the time allowed for contesting local option elections, which we mistakenly said was ten days, rather than twenty days. That was plainly dictum, the holding of the case being that a belated intervention years after the election was 1) too late and 2) without merit. That decision in no sense governs the case at hand. I respectfully dissent from the denial of rehearing.

CONCURRING OPINION

JOHN I. PURTLE, Associate Justice

The dissent by Justice Glaze is a little rough even by my standards. However, I do understand the intensity of his sentiment in the matter because he was the chief architect of the election code of 1969. The 1969 election code was an idea whose time had come and the reform legislation replaced a myriad of archaic and overlapping election laws. Justice Glaze believes that this legislation governs all election contests. I too thought the legislature intended to establish a uniform twenty day election contest law. However, in 1985 this court voted 6-0 (I did not participate) in *Wurst* v. *Lowery*, 286 Ark. 474, 695 S.W.2d 378 (1985), that local option election contests must be filed within ten days from certification of the election results.

The *Wurst* opinion, which was written by Justice George Rose Smith, dealt exclusively with the procedure to contest a local option election, which is the issue in the present case. The opinion stated:

> The attempt to intervene is far too late. Wurst could have intervened the day after the election had he been

> diligent. It is in the public interest that election results become final without delay. We hold that, by analogy, Wurst's time for intervening in the case expired with the lapse of the time allowed for filing a contest of a local option election, which is ten days after the certification of the vote. Ark. Stat. Ann. § 48-820 (Repl. 1977).

The opinion is clear and unambiguous. It is binding precedent and we have a choice of following it or overruling it. We do not have the option of ignoring it completely as has been done on the petition for rehearing.

I have no bias in favor of or against either side in this dispute. The *Wurst* decision is over two years old and has heretofore received little, if any, criticism from the legislature or the legal community. In accordance with *stare decisis*, I feel compelled to follow our latest decision on this issue, *Wurst*. Perhaps the General Assembly will now clarify the issue in a manner which will leave no room for disagreement in future local option election contests.

APPENDIX C

Petition for Rehearing,
filed January 5, 1988

IN THE

SUPREME COURT OF ARKANSAS

No. 87-102, 87-103

JIMMY D. GARRETT, et al.,

Appellants,

vs.

ED N. ANDREWS, et al.,

Appellees.

Appellees, for their Petition for Rehearing, state:

1. In *Henderson* v. *Anderson,* 251 Ark. 724, 475 S.W.2d 508 (1972), this Court held that ". . . the contest of any local option election should follow the statutes providing for the contest of any election for county officers; . . ." The Court's opinion in this case effectively overruled *Henderson* v. *Anderson.* As pointed out by the dissent, it is impossible to effectively investigate fraud in an election and file a complaint within ten (10) days which contains the specific allegations necessary in an election contest. Appellees respectfully suggest that the rule stated in *Henderson* v. *Anderson* is the better rule and the Court should reconsider overruling *Henderson* v. *Anderson.*

2. In its Opinion, the court held that Appellant Garrett had filed a timely Answer, although it was not filed within

twenty (20) days, because a trial court may permit an Answer at any time before trial. However, Appellant Garrett did not seek or obtain the trial court's permission to file an Answer after twenty (20) days and the trial court expressly ruled that his Answer was untimely. Surely the trial court should be allowed to determine, at least in the first instance, whether Appellant Garrett should be allowed to file an Answer many months after the Complaint was filed. That is particularly true since the Answer was not filed until the case was very near a resolution. If the Answer is disallowed, there would be no proper defendant to invoke the jurisdiction of this Court and thus this Court would have no jurisdiction to issue an Opinion.

3. These two cases (87-102, 87-103) were consolidated on appeal by order of this Court. Both Appellees raised numerous issues regarding the constitutionality of a liquor law, particularly as they relate to a wet-dry election. The trial court disposed of the case on other grounds, so the constitutional arguments by both Appellees have never been considered, either in the trial court or in this Court. The Complaint regarding the constitutionality of the statutes is in the nature of a declaratory judgment and would not be governed by the time limit for filing an election contest. This Court, in its original opinion, reverses and dismisses this cause, thus denying both Appellees the opportunity to be heard on the serious constitutional questions. Thus, if the Court does not reverse itself with respect to the other issues raised herein, it is imperative that the case be reversed and remanded with respect to the constitutional issues.

WHEREFORE, Appellees respectfully request that their Petition for Rehearing be granted and that the trial court's

judgment be affirmed or, alternatively, that the case be remanded to the trial court.

ED N. ANDREWS, et al,
Appellees
By:
IKE ALLEN LAWS, III
LAWS, SWAIN & MURDOCH, P.A.

FELVER A. ROWELL

and

/s/ ALEX G. STREETT
ALEX G. STREETT
P. O. Drawer "F"
Russellville, AR 72801

CERTIFICATE

I, Alex G. Streett, state that there is merit in this Petition, and it is not filed for the purpose of delay.

/s/ ALEX G. STREETT
ALEX G. STREETT

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to M. Watson Villines, II, 1310 Oak Street, Conway, Arkansas 72032 on this 5th day of January, 1987.

By /s/ALEX G. STREETT

APPENDIX D

Opinion of the Circuit Court of Conway County, filed April 8, 1987

IN THE
CIRCUIT COURT OF CONWAY COUNTY,
ARKANSAS

RE: Ed N. Andrews, et al v T.O. Adams, et al
Conway County Circuit No. CIV 86-274

Morrilton Liquor, Inc., et al v T.O. Adams, et al
Conway County Circuit No. CIV 86-275

ORDER

The opinion dated April 7, 1987, and attached hereto is hereby incorporated in this Order.

DATED this the 7th day of April, 1987.

/s/ RUSSELL ROGERS
Russell Rogers
Circuit Judge on exchange

cc: Mark Cambino
Watson Villines
Ike Allen Laws
Felver A. Rowell

Appendix D—Opinion of the Circuit Court of Conway County

OFFICE OF THE
CIRCUIT & CHANCERY JUDGE
Eleventh Judicial District – East
P. O. Box 365 – Arkansas County Court House
Stuttgart, Arkansas 72160
Phone 673-3181

April 7, 1987

Mr. Mark Cambino
Attorney at Law
108 S. Moose
Morrilton, Arkansas 72110

Mr. Watson Villines
Attorney at Law
1310 Oak Street
Conway, Arkansas 72032

Ike Allen Laws
Attorney at Law
P.O. Box 3000
Russellville, Arkansas 72801

Mr. Felver A. Rowell
Attorney at Law
P.O. Box 357
Morrilton, Arkansas 72110

RE: Ed N. Andrews, et al VS T.O. Adams, et al
Conway County Circuit No. CIV 86-274

Morrilton Liquor, Inc., et al VS T.O. Adams, et al
Conway County Circuit No. CIV 86-275

Gentlemen:

The Court's opinion in the captioned matter follows:

1. Most if not all of the motions filed so far are procedural as opposed to substantial. This is particularly so of the motion to dismiss the Plaintiff's complaint on the basis that it was not verified. That motion will be denied.

2. Ark. Stat. Ann. 3-1001 is clear in its application to all elections, and sets 20 days as the time within which an election contest may be filed. As the later of the two statutes (1969 vs 1935) it overrides that portion of 48-820 which allows only 10 days. *Henderson* v *Anderson* 251 Ark. 725, 475 S.W. 2d 508

clearly and without reservation holds that 3-1001-1009 applies to local option liquor election contests. *Wurst* v *Lowery* is of course in conflict with *Henderson*. This Court has to resolve that conflict and finds that *Wurst* was a mistake as to the filing limitations and that *Henderson* controls. The motion to dismiss of the proposed intervenors is accordingly denied.

3. *Henderson*, supra, does not of course affect the balance of 48-820 which holds that not less than 10 citizens and legal voters may resist an election contest. This would allow the intervention by the proposed intervenors *if there are 10 of them.* The complaint names only four but refers to an "unincorporated association known as the Citizens for Progress." As this point is not addressed by any party the Court will allow an additional 10 days from date for briefs and arguments on that point only.
4. This opinion is in effect written in reverse order in that if the motion to intervene is not allowed, paragraphs one and two are moot as the Election Commission is in default.
5. Please submit your briefs and arguments simultaneously, with copies to each other. You may respond within five days.

Yours very truly,

/s/ Russell Rogers
Russell Rogers
Circuit Judge on exchange

RR:sas

cc: Circuit Court File

APPENDIX E

Opinion of the Circuit Court of Conway County, filed May 14, 1987

IN THE
CIRCUIT COURT OF CONWAY COUNTY,
ARKANSAS

RE: Ed N. Andrews, et al v T.O. Adams, et al
Conway County Circuit No. CIV 86-275

Morrilton Liquor, Inc., et al v T.O. Adams, et al
Conway County Circuit No. CIV 86-274

ORDER

The Court's opinion letter dated May 13, 1987, is incorporated herein and attached and made the Order of the Court.

ORDERED this the 13th day of May, 1987.

/s/ RUSSELL ROGERS
Circuit Judge on Assignment

cc: Mark Cambino
Watson Villines
Ike Allen Laws
Felver A. Rowell

Appendix E—Opinion of the Circuit Court of Conway County

OFFICE OF THE
CIRCUIT & CHANCERY JUDGE
Eleventh Judicial District – East
P. O. Box 365 – Arkansas County Court House
Stuttgart, Arkansas 72160
Phone 673-3181

May 13, 1987

Mr. Mark Cambino
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Mr. Felver A. Rowell
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Morrilton, Arkansas 72110

RE: Ed N. Andrews, et al VS T.O. Adams, et al
Conway County Circuit No. CIV 86-274

Morrilton Liquor, Inc., et al VS T.O. Adams, et al
Conway County Circuit No. CIV 86-275

Gentlemen:

I have a basic prejudice in any lawsuit in favor of it going to trial rather than being resolved on a technical matter. This is especially true in this case. Ruling in favor of the motion to dismiss has the effect of overturning an election and is as repulsive to me as setting aside a jury's verdict.

However, the failure of the proposed intervenors to have ten reputable citizens to resist the election contest is juris-

dictional and fatal to the intervention sought. The statute and cases are clear and unambiguous on this point.

The motion of the Plaintiff to dismiss the proposed intervention is hereby reluctantly granted.

Yours very truly,

/s/ RUSSELL ROGERS
Russell Rogers
Circuit Judge on Assignment

RR:sas

cc: Circuit Court File

APPENDIX F

Complaint for Election Contest, No. CIV-86-274, filed November 26, 1986

IN THE

CIRCUIT COURT OF CONWAY COUNTY, ARKANSAS

No. CIV-86-274

ED N. ANDREWS, GEORGE ANDREWS, IDA WELTER ANDREWS, JOHN ANDREWS, WILLIAM R. DESALVO, BOBBY EPPERSON, FRANK FOUGEROUSSE, CHARLES GARRETT, JERRY GARRETT, GARY GILLEY, DON GUINN, JOHN R. HAWKINS, HERMAN F. KAUFMAN, MARGARET E. KAUFMAN, RAY KELLEY, MINUS KINDLE, OTTO L. LIENHART, II, HOOVER MCCOY, TIMOTHY L. MAHAN, LARRY O. NEWBERRY, NATHAN L. PALADINO, BOBBY RIDLING, WALLY TEMPLE, RONALD WIDNER and EUGENE C. YOUNG,

Plaintiffs,

VS.

T.O. ADAMS, JOHNNY DESALVO, and JIM GARRETT, Election Commissioners of Conway County, Arkansas,

Defendants.

Come the Plaintiffs by and through their attorney, Ike Allen Laws, Jr., and for their Complaint for Election Contest state as follows:

1. That the Plaintiffs are qualified legal voters of Conway County, Arkansas, and were qualified legal voters on

November 4, 1986, the date of the election complained of, and derive their livelihood in whole or in part from the sale of alcoholic beverages. That the Defendants are the Election Commissioners of Conway County, Arkansas.

2. That on November 4, 1986, on the general election ballot was the question of the legal sales of alcoholic beverages in Conway County. That on said ballot the issue was proposed thusly:

> "For the manufacture or sale of intoxicating liquors."
> "Against the sale or manufacture of intoxicating liquors."

That after a count and recount of the votes, the election commissioners certified the votes as 4,541 for and 4,574 against, a difference of thirty-three (33) votes.

3. That the election contained many instances of fraud and irregularities which would change the outcome of the election. That despite these irregularities, the Commissioners certified the vote as stated above. That the specific allegations of fraud and irregularities are listed as follows by township:

Austin

4. That a total of One Hundred Sixteen (116) persons voted in Austin Township, and the certified vote was Eighty-two (82) against and Thirty-four (34) for. That the election officials or their agents of Austin Township fraudulently substituted the ballots which they had previously marked for all One Hundred Sixteen (116) voters, and that said box should be thrown out in its entirety due to said fraud. That none of the ballots given in Austin

Township were initialed on the back by the Judges as required by Arkansas Statute § 3-717.

5. Albert L. Ludy voted twice, or someone voted for him and both ballots were "dry", and these ballots should be deleted.

6. That the ballot box was not sealed as required by law.

7. Karen Edwards did not sign the voter registration card, but voted "dry", and her ballot should be deleted.

Bentley Rural

8. That an individual purporting to be Billy C. Martin was allowed to vote despite the fact that he failed to sign a voter registration card. That this individual voted "dry", and his vote is an improper vote and should be deleted.

Bird

9. That the election officials or their agents of Bird Township fraudulently substituted all or part of the ballots, which ballots had been previously marked "dry" and had been initialed by persons other than the proper officials, and the entire ballot box should be deleted from the total votes.

Griffin

10. That fraud was committed in the election box in that One Hundred Sixty-five (165) ballots were placed in the box, but only One Hundred Sixty-three (163) voters signed the registration list. The box had been pried open prior to recount. The sanctity of the box was damaged, and the entire box should be deleted from the total count.

11. That A.E. Coffman voted "dry", but was not a qualified voter because he lives in Pope County, Arkansas, and his ballot should be deleted from the count.

12. That Geneva Coffman voted "dry", but was not a qualified voter because she lives in Pope County, Arkansas, and her ballot should be deleted from the count.

13. That an individual by the name of Becky Rae Ranijo was given a ballot and allowed to vote despite the fact that she was no longer a registered voter in Conway County, Arkansas. That this individual voted "dry", and that her vote should be deleted.

Howard City Box One

14. That there was one "dry" vote which did not contain the Judge's initial as required by law and which should be deleted.

15. That there were 218 persons on the voting list and 225 ballots in the box. That the box was tampered with, and the entire box should be deleted.

Howard City Box Two

16. There were ten (10) "dry" votes and four (4) "wet" votes that did not contain the Judge's initials and which should be deleted.

17. That there were 179 persons on the voting list and 171 ballots in the box. That the box was tampered with, and the entire box should be deleted.

Howard Rural

18. That three (3) ballots were completed in pencil until the wet/dry issue was met, in which case this question

was marked in pen. That on each of these three (3) ballots, the vote was marked as "dry" by the Election Commission. That these three (3) ballots should be deleted from the total number of ballots cast, as they were tampered with, and the voters did not vote on this issue.

19. That one (1) ballot is completed entirely in pencil. That on this ballot, the wet/dry issue was double marked as both a vote "for" and "against" the issue. That the "wet" box contains evidence of an attempted erasure. That the Commission counted this vote as a "dry" vote. That this attempted erasure is evidence of tampering with the ballot, and that therefore this ballot should be deleted from the total number of ballots cast upon the issue.

20. That incidents occurred where one or more election officials inside the polls engaged in deliberate and intentional electioneering practices designed to induce and influence voters to vote "dry". That the election officials actually handed out slips of paper to the voters requesting that they vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals' ballots should be deleted from the total number of votes cast upon the issue, or in the alternative, these individuals' votes should be changed from "dry" to a "wet" vote.

21. That ballot #12539 contains no sticker or Judge's initial. That this ballot indicated a "dry" vote. That this vote should be deleted from the total number of votes cast upon the issue.

22. That the tallet sheey was not placed in the ballot box.

23. That one ballot is marked both with check marks and with an "x" throughout the balloting. That this amounts to evidence of tampering with the ballot. That this ballot purports to indicate a "dry" vote. That this ballot should be deleted from the total number of votes cast upon the issue.

24. That two ballots contained initials of someone other than a judge of the precinct. That those ballots were marked "dry" and should be deleted.

Lick Mountain

25. There were two (2) "dry" ballots which did not contain the Judge's initials and which should be deleted from the total number of ballots cast.

Martin

26. That one "dry" ballot was marked differently for the wet/dry issue than for all other issues, and that said ballot was fraudulently completed by someone other than the registered voter and should be deleted.

Mc Claren

27. Jewel Connerly voted twice, or someone voted for her "dry". Both ballots should be deleted.

28. There were four (4) "dry" votes which did not contain the Judge's initials and which should be deleted.

Menifee

29. That individuals by the name of Connie Clark and Mark Clark were allowed to vote despite the fact that they were not residents of Conway County. That these individ-

uals, in fact, are residents of Perry County. That both voted "dry", and that their votes should be deleted.

Nichols

30. That Linda R. Campbell was allowed to vote despite the absence of a voter registration card. Said vote was improper and that said Linda R. Campbell voted "dry". Said vote should be deleted.

31. That Cynthia L. Stobaugh's name appeared on the voter list, but there was no signature on the voter's registration card, and the vote was "dry" and should be deleted from the total ballots cast.

32. That incidents occurred where one or more individuals engaged in deliberate and intentional electioneering practices designed to induce and influence voters to vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals' ballots should be deleted from the total number of votes cast upon the issue, or in the alternative, these individuals' votes should be changed to a "wet" vote.

Steele

33. Reubin Payne voted twice, or someone voted for him. Both ballots were "dry", and both votes should be deleted.

34. There were eleven (11) "dry" votes which did not contain the Judge's initials as required by law, and those ballots should be deleted.

35. That said box was not sealed in the manner required by law, and therefore the integrity of the box was compromised, and the entire box should be thrown out.

Appendix F—Complaint for Election Contest

Union

36. There were eleven (11) "dry" ballots which did not contain the Judge's initials and which should be deleted.

37. There was one (1) ballot marked both "wet" and "dry" which was counted "dry". That ballot should be deleted.

38. Peggy Connerly's name appeared on the voter list, but her card was not signed, and a "dry" ballot was cast on her behalf and should be deleted.

39. Mavis Smith voted "dry" twice, or someone voted for her, and did not sign the voter registration card, and her ballot should be deleted.

40. That three (3) ballots contained evidence of fraud in that the ballots were marked in pencil until the wet/dry issue, which was voted on in pen, or vice versa. There was a total of three (3) ballots indicating "dry" votes. That each of these three (3) votes should be deleted from the total number of votes cast on the issue.

41. That three (3) ballots contained evidence of tampering in that the ballots are completed in a consistent manner until the wet/dry issue is met upon the ballot, in which case the ballot is double marked, indicating evidence of an attempted erasure. That each of these three (3) ballots are marked in pencil. That a total of three (3) ballots were counted as "dry" votes. That each of these three (3) ballots should be deleted from the total number of votes cast on the issue.

42. That at no time during the election hours was the stub box sealed, contrary to Arkansas law. Therefore, this

entire ballot box should be deleted from the total number of ballots cast, both "for" and "against" the issue.

Washington Box One

43. The election officials or their agents fraudulently replaced one hundred sixty-seven (167) ballots which had been previously marked "dry" for ballots voted by the electors. These ballots should be deleted from the count.

Washington Box Two

44. Clara Mae Scott voted "dry" twice, or someone voted for her, and both ballots should be deleted from the count.

45. Ruby Rondinone voted "dry", but was not a qualified elector, since she only registered October 24, 1986, and her vote should be deleted from the count.

46. That many ballots were marked in pen except for the wet/dry issue, and the wet/dry issue was voted upon in pencil and vice versa, indicating that the ballots were completed by someone other than the registered voter. That in each instance, the person who completed the ballot voted "dry".

47. That two (2) ballots were double marked both "wet" and "dry". That these ballots contained evidence of tampering in that the "wet" box is smudged or partially erased. That these votes were counted "dry" and that these votes should be deleted from the total votes cast.

48. That 347 voters signed the voter list, and there are 354 ballots in the ballot box. That said shortage indicates a tampering with the box. That as a result, the entire box

should be deleted from the total votes cast, both "for" and "against" the issue.

49. That an individual by the name of Bennie Lee Scroggin was given a ballot and allowed to vote despite the fact that she was no longer a qualified registered voter in Conway County, Arkansas. That this individual voted "dry", and that her ballot should be deleted from the total number of ballots cast upon the issue.

50. That extensive electioneering was carried on by the officials at the polling place to the extent of advising voters, especially those who were illiterate, to vote "dry". That this action coupled with the action in all the paragraphs above in this box violates the integrity of the box, and the whole box should be thrown out by this Court because of its effect on all the boxes.

Ward One Box One

51. There were seven (7) "dry" ballots and two (2) "wet" ballots which did not contain the Judge's initials as required by law, and these ballots should be deleted from the count.

52. That an individual by the name of Muriel S. Watt was allowed to vote despite the fact that no voter registration card was present at the polling place. That said individual voted upon the wet/dry issue and voted "dry". That this vote is an improper vote and should be deleted from the total number of ballots cast upon the issue.

Ward One Box Two

53. That an individual by the name of Sam Hayre appeared and voted in this precinct and voted "wet". That

some other individual at another time and place voted a ballot using the name of Sam Hayre and voted "dry". That the illegal "dry" ballots should be removed from the box and deleted from the total count.

54. Karen Hayre voted twice, or someone voted for her, and these two ballots should be deleted from the count.

Ward One Box Three

55. There were six (6) "dry" votes which did not contain the Judge's initials as required by law, and these ballots should be deleted from the count.

Ward Two Box Two

56. There were four (4) "dry" votes which did not contain the Judge's initials as required by law and should be deleted from the count.

Ward Three Box One

57. Somebody fraudulently voted "dry" for Barbara Cooper, who is deceased. This ballot should be deleted from the count.

58. Barbara Brooks voted "dry", but was not a qualified voter because she never signed her registration card, and her ballot should be deleted from the count.

59. That five (5) ballots contain evidence of tampering or fraud in that in each case the ballot is completed in both pen and pencil. That three (3) votes were counted as "dry" votes. That each of these three (3) ballots should be deleted from the total number of votes cast upon the issue.

60. That one (1) ballot contains evidence of tampering, in that the ballot was double marked. That the "wet" box shows an erasure entirely through the ballot and is marked in ink in the "dry" box. That this ballot was completed by someone other than the registered voter, and that this ballot should be deleted from the total number of votes cast upon the issue.

61. That no voter registration list was contained in the ballot box as required by law, and that for this reason the entire box should be deleted from the total number of votes cast upon the issue.

Ward Three Box Two

62. Iva Lee Mooney voted "dry", but her ballot should be deleted since she did not sign the voter registration card.

63. That ballot #4886 is attached to stub #244. That this ballot is improper upon its face, and has obviously been tampered with and should be deleted from the total number of votes cast upon the issue.

64. That one (1) ballot contains no check or "x" in either box, but has the words "against". That this is an improper vote and is evidence of tampering with said ballot. That this vote was counted as a "dry" vote and should be deleted from the total number of votes cast upon the issue.

65. That one (1) ballot is completed entirely in ink until the wet/dry issue is met. That the issue is double marked in pencil and indicates evidence of an attempted erasure on the "wet" box. That this ballot was completed by some-

one other than the registered voter and should be deleted from the total number of votes cast upon the issue.

66. That one (1) ballot is double marked and said box contains evidence of tampering in that an attempted erasure is made in the "wet" box. Said ballot was counted as a "dry" vote and should be deleted from the total number of votes cast upon the issue.

That one ballot was voted "dry" but contains the words "replaced bad ballot". This was improper and should be deleted.

67. That the polling places for Ward Three, Boxes one, two and three, were removed from the traditional polling place without proper notice by the Election Commission for the purpose of disinfranchising "wet" voters, and that numerous "wet" voters appeared at the polls to vote and could not do so, and that in addition notices on the changes of voting places were repeatedly torn down by election officials or "dry" voters, causing many persons to be disinfranchised. Those persons who attempted to vote should be allowed to cast their vote at this time as required by law, or the entire box should be deleted from the regular count.

Ward Three Box Three

68. Two (2) ballots were marked both "for" and "against" and were counted "dry" and should be deleted from the Count.

Ward Four Box One

69. Lloyd Jackson voted "dry" but was not a registered voter. He signed his Floyd Jackson's registration card,

and his vote should be deleted from the total number of votes cast.

Welbourne West

70. That individuals by the names of James Boren and Estellene Boren were allowed to vote and were given a printed ballot form. That said individuals are not residents of Conway County, but rather are residents of Pope County, Arkansas. That on the issue in question, these individuals voted "dry", and that their ballots should therefore be deleted.

71. That incidents occurred in which one or more individuals engaged in deliberate and intentional electioneering practices designed to induce and influence voters to vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals' ballots should be deleted from the total number of votes cast upon the issue, or in the alternative, these individuals' votes should be changed from a "dry" vote to a "wet" vote.

72. That individuals by the names of Valerie P. Lynch and William C. Young appeared at the voting precinct and were given a ballot and were allowed to vote despite the fact that there were no voter registration cards present for these individuals to sign. That these individuals voted "dry". That said votes are improper and should be deleted.

Constitutional Issues

The aforementioned election was held in accordance with Initial Measure Number 1 of 1942, which is now Chapter 48-801 et seq of the statutes of the State of Arkansas. That this Statute as applied to local option election is unconstitutional, in that it provides (48-816) that in the county-

wide election, if the majority of the county votes "dry", then all towns, cities, districts or precincts shall be "dry", but if the entire county votes "wet", then any town, city, district or precinct that previously voted "dry" shall remain "dry". That additionally, the Statute allows voters in dry precincts to vote "wet" precincts "dry", but does not allow voters in wet precincts to vote dry precincts "wet". The entire Statute is drafted in such a manner as to be slanted in favor of dry citizens. That all such provisions are in violation of Plaintiffs' right to equal protection under the law as provided for in Amendment 14 of the Constitution of the United States and Article 2, Section 3 of the Constitution of the State of Arkansas.

Other Allegations

That the Plaintiffs have reason to believe, and therefore allege that in addition to all the specific allegations set out in the paragraphs above, that there was widespread fraud, electioneering, ballot tampering, that ballot boxes and stub boxes were unsealed; that various persons had access to said ballot boxes and stub boxes; that some boxes had been pried open by force; that there was no record kept for the seals issued for the ballot or stub boxes; that some ballot and stub boxes had extra seals in the bottom of the boxes; that voter lists were not placed in the boxes after the count as required by law; that some voting lists are missing completely; that since the recount, the ballots have been removed from the ballot boxes and comingled with ballots from other wards; that the stub boxes have not been maintained in a secure and safe place, and their integrity has been violated; that the vast majority of the election officials appointed to work the elec-

tion by the Election Commission were in favor of voting against the sale of alcoholic beverages, and officials favoring the sale of alcoholic beverages were systematically excluded from working the polls; that poll watchers were refused admission to the voting places on occasion, and other irregularities which violate the integrity of the entire election. That the Plaintiffs are in the process of uncovering the specific acts so constituted, but because of the statute of limitation of time cannot allege them with specificity at this time, and therefore request the Court that they be allowed to amend this Complaint at a later time to include these allegations which they believe violate the integrity of the entire election, causing the same to completely be thrown out.

WHEREFORE, Premises Considered, the Plaintiffs pray that the entire election held on November 4, 1986, be thrown out, or in the alternative that for a finding that the total number of votes cast after the deductions requested herein for the manufacture or sale of intoxicating liquors is greater than those votes cast against the manufacture or sale of intoxicating liquors, or in the alternative, a ruling by the Court that the entire election was tainted, and therefor an Order holding said election to be null and void and without effect, and for all other just and proper relief, and the County should be allowed to continue the sale of alcoholic beverages under the control of the Arkansas Alcoholic Beverage Control Division. Further Plaintiffs pray that, pending the outcome of this cause, that the Court issue an Order impounding all available ballot boxes, voter lists, talley sheets, and challenged ballots in the hands of the County Clerk in as safe and convenient place, to be held there until further directed by the Court.

Appendix F—Complaint for Election Contest

ED N. ANDREWS, GEORGE ANDREWS, IDA WELTER ANDREWS, JOHN ANDREWS WILLIAM R. DESALVO, BOBBY EPPERSON FRANK FOUGEROUSSE, CHARLES GARRETT JERRY GARRETT, GARY GILLEY, DON GUINN, JOHN R. HAWKINS, HERMAN F. KAUFMAN, MARGARET E. KAUFMAN, RAY KELLEY, MINUS KINDLE, OTTO L. LIENHART, II, HOOVER MCCOY, TIMOTHY L. MAHAN, LARRY O. NEWBERRY, NATHAN L. PALADINO, BOBBY RIDLING, WALLY TEMPLE, RONALD WIDNER, EUGENE C. YOUNG, Plaintiffs

By /s/ IKE ALLEN LAWS, JR.
LAWS, SWAIN & MURDOCH, P.A.
P.O. Box 3000
Russellville, AR 72801
PH: 501/968-1168

and

FELVER A. ROWELL
Attorney at Law
P.O. Box 357
Morrilton, AR 72110
PH: 501/354-3668

Appendix F—Complaint for Election Contest

AFFIDAVIT

STATE OF ARKANSAS
COUNTY OF CONWAY

Come the undersigned and state on oath that the facts set out in the foregoing Complaint and true and correct as they verily believe on this 26th day of November, 1986.

/s/ JOHN ROBERT HAWKINS
JOHN ROBERT HAWKINS

/s/ ROXANNE EPPERSON
ROXANNE EPPERSON

SUBSCRIBED and SWORN to before me on this 26th day of November, 1986.

/s/ BETH COGER
Notary Public

My Commission Expires:
4-18-92

APPENDIX G

Complaint, No. CIV-86-275, filed November 26, 1986

IN THE

CIRCUIT COURT OF CONWAY COUNTY, ARKANSAS

No. Civ. 86-275

MORRILTON LIQUOR, INC. d/b/a #1 LIQUOR, ARKANSAS LIQUOR, INC. and CHARLES GARRETT d/b/a GARRETT'S CAFE,

Plaintiffs,

vs.

T.O. ADAMS, JIM GARRETT, and JOHNNY DESALVO, Election Commissioners of Conway County, Arkansas and CHARLES SINGLETON, Director of the Arkansas State Alcohol Beverage Control Division,

Defendants.

FIRST CAUSE OF ACTION

(Methods and Manner of Conducting Election)

Come the Plaintiffs, Morrilton Liquor, Inc., d/b/a #1 Liquor, Arkansas Liquor, Inc., and Charles Garrett d/b/a Garrett Cafe, by their attorney, Mark S. Cambiano, and for their cause of action against the Defendants, T.O. Adams, Jim Garrett, and Johnny DeSalvo, Election Commissioners of Conway County, Arkansas, and Charles Singleton, Director of Arkansas Beverage Control Division, allege and state:

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1. (A) That the Plaintiff, Morrilton Liquor, Inc., d/b/a #1 Liquor, is a corporation, organized and existing under the laws of the State of Arkansas, having its principal place of business in Conway County, Arkansas;

(B) That Plaintiff, Arkansas Liquor, Inc. is a corporation, organized and existing under the laws of the State of Arkansas, having its principal place of business in Conway County, Arkansas;

(C) That Plaintiff, Charles Garrett is an individual and resident of Conway County, Arkansas and is doing business as Garrett's Cafe;

(D) That the Defendants, T.O. Adams, Jim Garrett and Johnny DeSalvo are individuals and residents of Conway County, duly elected to the Conway County Election Commission and are responsible for the conducting of elections and certifying the results thereof within Conway County, Arkansas;

(E) That Defendant, Charles Singleton, is the Director of the Arkansas Beverage Control Division and is responsible for the enforcement of laws relating to the sale of alcoholic beverages within the State of Arkansas;

(F) That this Court has jurisdiction of this cause.

2. (A) That the Plaintiffs, Morrilton Liquor, Inc. d/b/a #1 Liquor and Arkansas Liquor, Inc. are engaged in the business of operating liquor stores in Conway County, Arkansas;

(B) That Plaintiff, Charles Garrett d/b/a Garrett's Cafe is engaged in the on-premises retail sale of alcoholic beverages in said county.

3. That on November 4, 1986, at the general election within the State of Arkansas, there was conducted in Conway County an election pursuant to Ark. Stat. Ann. §48-801, et seq., wherein the issue of the legal sales of (intoxicating liquors) alcoholic beverages was submitted to voters.

4. That upon count and recount of the votes in said election, the Conway County Election Commissioners certified that the issue had been voted in favor of prohibition against the legal sales of alcoholic beverages in Conway County, Arkansas.

5. That this election should be invalidated in that the wrongs alleged herein appear to have been clear and flagrant in nature, diffusive in influence, calculated to effect more than can be traced and sufficiently potent to render the results uncertain.

6. That the election contained many instances of fraud and irregularities which would change the outcome of same.

7. That, in violation of their oath of office and of the law, certain election officials circulated petitions which placed this issue on the ballot, and that said election officials engaged in conduct calculated to coerce voters into voting against the sale of said alcoholic beverages.

8. That the specific allegations of fraud and irregularities are listed by township as follows:

I. *Austin*

A. That a total of One Hundred Sixteen (116) persons voted in Austin Township, and the certified vote was

Eighty-Two (82) against and Thirty-Four (34) for. That the election officials or their agents of Austin Township fraudulently substituted the ballots which they had previously marked for all One Hundred Sixteen (116) voters, and that said box should be thrown out in its entirety due to said fraud. That none of the ballots given in Austin Township were initialed on the back by the Judges as required by Ark. Stat. Ann. §3-710.

B. Albert L. Ludy voted twice, or someone voted for him and both ballots were "dry", and these ballots should be deleted.

C. That the ballot box was not sealed as required by law.

D. Karen Edwards did not sign the voter registration card, but voted "dry", and her ballot should be deleted.

II. *Bentley Rural*

A. That an individual purporting to be Billy C. Martin appeared to vote and was allowed to vote despite the fact that the individual, Billy C. Martin, had failed to sign a voter registration card. That this individual voted "dry", and his vote is an improper vote and should be deleted from the total number of ballots cast upon the issue.

III. *Bird*

A. That fraudulent ballots were placed in the box by the election officials or their agents. The ballot box was not sealed, and there was not a voter list in the box as required by law, and the entire ballot box should be deleted from the total votes.

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IV. *Griffin*

A. That fraud was committed in the election box in that One Hundred Sixty-Five (165) votes were placed in the box, but only One Hundred Sixty-Three (163) voters signed the registration list. The box had been pried open prior to recount. The sanctity of the box was damaged, and the entire box should be deleted from the total count.

B. That A.E. Coffman voted "dry", but was not a qualified voter because he lives in Pope County, Arkansas, and his ballot should be deleted from the count.

C. That Geneva Coffman voted "dry", but was not a qualified voter because she lives in Pope County, Arkansas, and her ballot should be deleted from the count.

D. That an individual by the name of Becky Rae Ranijo appeared to vote and was given a bollot and allowed to vote despite the fact that she was no longer a qualified registered voter in Conway County, Arkansas. That this individual voted "dry" and that her vote should be deleted from the total number of ballots cast upon the issue.

V. *Howard City Box One*

A. That there was one "dry" vote which did not contain the Judge's initial as required by law and which should be deleted.

VI. *Howard City Box Two*

A. There were ten (10) "dry" votes and four (4) "wet" votes that did not contain the Judge's initials and which should be deleted.

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VII. *Howard Rural*

A. That three (3) ballots were completed in pen in each election until the wet/dry issue was met, in which case this question was marked in pencil. That in each case, this question was marked in pencil. That on each of these three (3) ballots, the vote was marked "dry" in pencil and counted as "dry" by the Election Commission. That these three (3) ballots should be deleted from the total number of ballots cast.

B. That one (1) ballot is completed entirely in pencil. That on this ballot, the wet/dry issue was double marked as both a vote "for" and "against" the issue. That the "wet" ballot contains evidence of an attempted erasure. That the Commission counted this vote as a "dry" vote. That this attempted erasure is evidence of tampering with the ballot, and that therefore this ballot should be deleted from the total number of ballots cast upon the issue.

C. That incidents occurred where one or more individuals engaged in deliberate and intentional electioneering practices designed to induce and influence voters to vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals' ballots should be deleted from the total number of votes cast upon the issue, or in the alternative, these individuals' votes should be changed from "dry" to a "wet" vote.

D. The ballot #12539 contains no sticker or Judge's initial. That this ballot indicated a "dry" vote. That this vote should be deleted from the total number of votes cast upon the issue.

E. That one ballot is marked both with check marks and with an "x" throughout the balloting. That this

amounts to evidence of tampering with the ballot. That this ballot purports to indicate a "dry" vote. That this ballot should be deleted from the total number of votes cast upon the issue.

VIII. *Lick Mountain*

A. There were two (2) "dry" ballots which did not contain the Judge's initials and which should be deleted from the total number of ballots cast.

IX. *Martin*

A. That one ballot contained checks and X's in pen and ink. That said ballot contained a "dry" vote. That said ballot is fraudulent in that it was completed by someone other than the registered legal voter, and that said ballot should be deleted from the total number of votes cast on the issue.

X. *McClaren*

A. Jewel Connerly voted twice, or someone voted for her "dry". Both ballots should be deleted.

B. There were four (4) "dry" votes which did not contain the Judge's initials and which should be deleted.

XI. *Menifee*

A. That individuals by the name of Connie Clark and Mark Clark appeared to vote and were allowed to vote despite the fact that they were not residents of Conway County. That these individuals, in fact, are residents of Perry County. That both voted "dry", and that their votes should be deleted from the total number of votes cast upon the issue by virtue of their improper ballots.

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XII. *Nichols*

A. That one Linda R. Campbell was allowed to vote without virtue of a voter registration card. Said vote was improper and that said Linda R. Campbell voted "dry". Said vote should be deleted from the total number of ballots cast upon the issue.

B. That Cynthia L. Stobaugh failed to sign her voter registration card, but was allowed to vote and voted "dry". This vote is improper and should be deleted from the total number of ballots cast upon the issue.

C. That incidents occurred where one or more individuals engaged in deliberate and intentional electioneering practices designed to induce and influence voters to vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals' ballots should be deleted from the total number of votes cast upon the issue.

XIII. *Steele*

A. Reubin Payne voted twice, or someone voted for him "dry", and both votes should be deleted.

B. The election officials or their agents fraudulently replaced one hundred sixty-seven (167) ballots which had been previously marked "dry" for ballots voted by the electors. The ballots should be deleted from the count.

XIV. *Washington Box Two*

A. Clara Mae Scott voted "dry" twice, or someone voted for her, and both ballots should be deleted from the count.

B. Ruby Rondinone voted "dry", but was not a qualified elector, since she only registered October 24, 1986, and her vote should be deleted from the count.

C. That many ballots were marked in pen except for the wet/dry issue, and the wet/dry issue was voted upon in pencil and vice versa, indicating that the ballots were completed by someone other than the registered voter. That in each instance, the person who completed the ballot voted "dry".

D. That two (2) ballots were double marked both "wet" and "dry". That these ballots contained evidence of tampering in that the "wet" box is smudged or partially erased. That these votes were counted "dry" and that these votes should be deleted from the total votes cast.

E. That more voters signed the voter list than there are ballots in the ballot box. That said shortage indicates a tampering with the box. That as a result, the entire box should be deleted from the total votes cast, both "for" and "against" the issue.

F. That an individual by the name of Bennie Lee Scroggin appeared to vote and was given a ballot and allowed to vote despite the fact that she was no longer a qualified registered voter in Conway County, Arkansas. That this individual voted "dry", and that her ballot should be deleted from the total number of ballots cast upon the issue.

XV. *Ward One Box One*

A. There were seven (7) "dry" ballots and two (2) "wet" ballots which did not contain the Judge's initials as required by law, and these ballots should be deleted from the count.

B. That an individual by the name of Muriel S. Watt was allowed to vote despite the fact that no voter registration card was present at the polling place. That said individual voted upon the wet/dry issue and voted "dry".

That this vote is an improper vote and should be deleted from the total number of ballots cast upon the issue.

XVI. *Ward One Box Two*

A. That an individual by the name of Sam Hayre appeared and voted in this precinct and voted "wet". That some other individual at another time and place voted a ballot using the name of Sam Hayre and voted "dry". That these two votes should be deleted from the total number of ballots cast upon the issue.

B. Karen Hayre voted twice, or someone voted for her, and these two ballots should be deleted from the count.

XVII. *Ward One Box Three*

A. There were six (6) "dry" votes which do not contain the Judge's initials as required by law, and these ballots should be deleted from the count.

XVIII. *Ward Two Box Two*

A. There were four (4) "dry" votes and three (3) "wet" votes which did not contain the Judge's initials as required by law and should be deleted from the count.

XIX. *Ward Three Box One*

A. Somebody fraudulently voted "dry" for Barbara Cooper, who is deceased. This ballot should be deleted from the count.

B. Barbara Brooks voted "dry", but was not a qualified voter because she never signed her registration card, and her ballot should be deleted from the count.

C. That five (5) ballots contain evidence of tampering or fraud in that each case the ballot is completed in both

pen and pencil. That three (3) votes were counted as "dry" votes and two (2) votes were counted as "wet" votes. That each of these five (5) ballots should be deleted from the total number of votes cast upon the issue.

D. That one (1) ballot contains evidence of tampering, in that the ballot was double marked. That the "wet" box shows an erasure entirely through the ballot and is marked in ink in the "dry" box. That this ballot was completed by someone other than the registered voter, and that this ballot should be deleted from the total number of votes cast upon the issue.

E. That no voter registration list was contained in the ballot box as required by law, and that for this reason the entire box should be deleted from the total number of votes cast upon the issue.

XX. *Ward Three Box Two*

A. Iva Lee Mooney voted "dry", but her ballot should be deleted since she did not sign the voter registration card.

B. The ballot #4886 is attached to stub #244. That this ballot is improper upon its face, and has obviously been tampered with and should be deleted from the total number of votes cast upon the issue.

C. That one (1) ballot is completed entirely in ink until the wet/dry issue is met. That the issue is double marked in pencil and indicates evidence of an attempted erasure on the "wet" box. That this ballot was completed by someone other than the registered voter and should be deleted from the total number of votes cast upon the issue.

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XXI. *Ward Three Box Three*

A. Two (2) ballots were marked both "for" and "against" and were counted twice and should be deleted from the count.

XXII. *Ward Four Box One*

A. Lloyd Jackson voted "dry" but was not a registered voter. He signed his father's registration card, and his vote should be deleted from the total number of votes cast.

XXIII. *Welbourne West*

A. That individuals by the names of James Boren and Estellene Boren were allowed to vote and were given a printed ballot form. That said individuals are not residents of Conway County, but rather are residents of Pope County, Arkansas. That on the issue in question, these individuals voted "dry" and that their ballots should therefore be deleted from the total number of ballots cast upon the issue.

B. That incidents occurred in which one or more individuals engaged in deliberate and intentional electioneering practices designed to influence and induce voters to vote "dry". That as a result of these electioneering practices, individuals did vote "dry". These individuals ballots should be deleted from the total number of votes cast upon the issue.

C. That individuals by the names of Valerie P. Lynch and William C. Young appeared at the voting precinct and were given a ballot and were allowed to vote despite the fact that there were no voter registration cards present for these individuals to sign. That these individuals voted "dry" and that said votes are improper and should be deleted from the total number of votes cast upon the issue.

WHEREFORE, Plaintiffs pray that this court find that the total number of legal votes cast for the sale of intoxicating liquors is greater than those votes cast against same, and certify the results of said election in accordance therewith, for their costs, and for all other relief to which they are entitled.

SECOND CAUSE OF ACTION

(Constitutionality of Statutes Under Which Election Held)

1. That Plaintiffs, Morrilton Liquor, Inc., d/b/a #1 Liquor, Arkansas Liquor, Inc., and Charles Garrett d/b/a Garrett's Cafe, hereby incorporate each of the allegations contained in the first cause of action herein, inclusive, and as though they were repeated verbatim herein in this cause of action.

2. That Plaintiffs have expended great sums of money, and having been established for a long period of time and maintained a good reputation and by reason thereof have a good will, and have a valuable property right in their respective businesses.

3. That the right to engage in the sale of alcoholic beverages and the individual states' regulation thereof is specifically recognized by the Twenty-first Amendment to the Constitution of the United States.

4. That Ark. Stat. Ann. §48-801, et seq., allow counties and other political subdivisions within this State to prohibit or otherwise restrict the sale of beer and other alcoholic beverages to the public upon a majority vote of the qualified electors therein.

5. (A) That Arkansas Stat. Ann. §48-801, et seq. and §48-1401, et seq., are the state laws concerning the dispensing of alcoholic beverages in counties which vote "dry", i.e. to prohibit same, and that said laws, without any rational or reasonable bases for distinction and discrimination, allow private clubs and others to manufacture, sell, barter, loan or give away liquor while prohibiting same for retail establishments for on-premises consumption and liquor stores open to the public, such as the businesses of the Plaintiffs herein.

(B) That Ark. Stat. Ann. §48-1402 (1985 Cum. Supp.) specifies the legislature's basis for this distinction and discrimination in allowing private clubs, motels, hotels, and restaurants in "dry" counties to dispense alcoholic beverages, while prohibiting same for establishments open to the public, such as those of the Plaintiffs.

(C) That the basis for this disparate treatment of one class of persons is the legislative finding that the "tourist and convention industry contribute substantially to the revenues of business enterprise in this State" and that tourists to this State must have these services available to them in order for this State to be competitive in attracting visitors.

(D) That like the motels, hotels, restaurants, and private clubs specified in Ark. Stat. Ann. §48-1402, Plaintiffs contribute to said "business enterprise" of this State and provide this service to the general public which includes the tourists and other visitors to this part of the State.

(E) That there is no reasonable basis for this disparate treatment in those establishments and the businesses of the Plaintiffs; that said statutes grant an unconstitutional special privilege to one class of persons;

(F) That said statutes permit classification in an arbitrary manner and impose on one class of persons a burden not imposed on others in like circumstances or engaged in similar businesses, thereby denying Plaintiffs of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the State of Arkansas.

5. (A) That Ark. Stat. Ann. §48-829.1 (1985 Cum. Supp.) provides for the retail sale to the public of alcoholic beverages produced by "facilities used to produce native wines, beer, or for the distilling, blending, or rectifying of alcoholic beverages" in counties which have voted "dry" in local options.

(B) That there is no reasonable basis for this disparate treatment in those establishments and the businesses of the Plaintiffs; that said statutes grant an unconstitutional special privilege to one class of persons;

(C) That said statutes permit classification in an arbitrary manner and impose on one class of persons a burden not imposed on others in like circumstances or engaged in similar businesses, thereby denying Plaintiffs of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the State of Arkansas.

6. (A) That Ark. Stat. Ann. § 48-802 (1985 Cum Supp.) provides for the sale of alcoholic beverages by manufacturers to wholesale distributors and other establishments which offer same for retail sale to the public (such as Plaintiffs) in counties which have voted "dry" in local options.

(B) That there is no reasonable basis for this disparate treatment in those establishments and the businesses of the Plaintiffs; that said statutes grant an unconstitutional special privilege to one class of persons;

(C) That said statutes permit classification in an arbitrary manner and impose on one class of persons a burden not imposed on others in like circumstances or engaged in similar businesses, thereby denying Plaintiffs of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the State of Arkansas.

7. (A) That prior to the vote which alleges to have prohibited the sale of alcoholic beverages in Conway County, Plaintiffs herein were engaged in the business of operation of liquor stores open to the public and expended great sums of money to become engaged in said businesses.

(B) That at the time Plaintiffs commenced their businesses in Conway County, Arkansas, same were lawful business enterprises in said county, authorized by state law.

(C) That the aforementioned legislation which allows a theretofor legitimate business activity to be subsequently prohibited, and provides for criminal penalties therefore, is an unconstitutional deprivation of property without due process of law in violation of the Constitution of the United States and the Constitution of the State of Arkansas.

(D) That the aforementioned legislation which allows a theretofor legitimate business activity to be subsequently prohibited, and provides for criminal penalties therefore, is ex post facto legislation in violation of the Constitution

of the United States and the Constitution of the State of Arkansas.

8. That while the sale of alcoholic beverages within this State is a privilege rather than a right, and while the supervision and regulation of this industry is in the interest of public welfare, considerations of fairness and justice comporting with due process must be evident, and the Plaintiffs are entitled to equal enforcement and application of that privilege.

9. That the provisions and restrictions in the aforementioned statutes are arbitrary, capricious and vague, and are oppressive and unreasonable both in their construction and as applied to the Plaintiffs.

10. That the enforcement of said statutes heretofore mentioned rests with Defendant, Charles Singleton as Director of the Arkansas Beverage Control Board, is performed under color of law, and therefore constitutes actions of the State within the meaning of the Fourteenth Amendment to the Constitution of the United States.

11. That the state statutes heretofore mentioned, materially and adversely affect Plaintiffs' businesses, and that said Plaintiffs will be put out of business due to these state statutes unless the enforcement thereof is restrained pending final adjudication of these issues; and that Plaintiffs have no adequate remedy at law other than by obtaining injunctive relief.

WHEREFORE, Plaintiffs pray for a declaratory judgment declaring that the above statutes cited herein are void, unconstitutional and ineffective, and without force of law,

and that Plaintiffs are not required to comply with the terms and provisions thereof; that the election held pursuant thereto in Conway County, Arkansas on November 4, 1986, be declared null and void and without legal effect; that the Defendants and each of them, their agents and servants, be restrained and enjoined by the order of this Court from exercising any of the powers, rights or duties respecting the enforcement of said statutes against Plaintiffs insofar as same purport to confer such rights, powers and duties on the Defendants and each of them; Plaintiffs further pray for their costs herein and for such further relief as they may be entitled.

Respectfully submitted,

/s/ Mark S. Cambiano
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